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**JAN 18 2007**

Attorney Docket Number: FSP0152  
Title: network performance determining  
Application Number: 09/995,371

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**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

**for**

Attorney Docket Number: FSP0152  
Client Reference Number: 260155US  
Title: network performance determining  
Application Number: 09/995,371  
Filing Date: Monday, November 26, 2001  
First Named Inventor: Cruickshank III, Robert F.  
Group Art Unit: 2151  
Examiner Name: Patel, Dhairya

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Review is requested of the final rejection in the above-identified application. No amendments are being filed with this request.

This Request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

I am the attorney or agent of record.

Signature      /Charles A. Mirho/      Date: 1/17/2007  
Charles A. Mirho  
Reg. 41,199  
Attorney for Applicant

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### **ISSUES/ARGUMENTS FOR WHICH THIS REVIEW IS BEING REQUESTED**

Regarding claims 27, 34, 39, and 40, the rejection relies on Kavounis as teaching the weighting of contributors to performance metrics for lower topological layers of a network into a performance metric for a higher network topological layer.

Kavounis never mentions weighting contributors of network performance. Equally significant, Kavounis is directed entirely toward collecting business process data from business applications, not collecting network performance data from network equipment (i.e. performance data for topological network levels). Kavounis are supply chain management applications, supplier relations applications, and pricing management applications. The data collected involves supply chain and pricing. It has nothing to do with network performance metrics for topological layers of a network. Any combination of the data collected in Kavounis has nothing at all to do with forming a metric of network performance for a higher topological layer of a network.

Kavounis also fails to teach weighting contributors to performance metrics for lower topological levels of a network to determine a metric of performance of a higher topological network level.

Claim 30, which is cancelled, is improperly rejected. Note that the limitations of cancelled claim 30 are substantially incorporated into claims 27, 34, 39, and 40. The rejection acknowledges on more than one occasion that Grabelsky fails to teach these limitations, and yet relies on Grabelsky to reject the very same limitations in claim 30.

Claim 31 (which is not cancelled) also substantially includes the weighting limitations of cancelled claim 30. While the rejection acknowledges on more than one occasion that Grabelsky fails to teach these limitations, it relies on Grabelsky to reject the very same limitations in claim 31.

Claim 32 recites normalizing raw performance data to derive performance metrics. The rejection relies on Grabelsky (e.g. col. 12, lines 31-45), which merely

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describes using statistics of raw data derived over time intervals (e.g. averages, means). Nowhere in Grabelsky is normalization of the raw data described.

Regarding claim 36, the rejection relies on Grabelsky to teach weighting raw data of network performance according to whether the raw data is a root cause or merely a contributor to the root cause of network performance degradation. As previously noted, the rejection acknowledges that Grabelsky fails to teach the weighting of contributors such as raw data to performance metrics. Furthermore, nowhere in Grabelsky are root causes of performance degradation, or contributions thereto, ever discussed or disclosed. Grabelsky simply doesn't contemplate a distinction between root causes and contributors thereto.

Claim 37 recites promotion of contributors to root causes under proper circumstances. Again, root causes and contributors thereto are simply not contemplated anywhere in Grabelsky.

Claims 28, 33, 35, and 39 all variously describe the use of cable modem hours when forming performance metrics. The rejection relies on Bearden for a teaching of the use of cable modem hours in performance metrics. In fact, Bearden never mentions cable modems or cable modem hours at all. The rejection thus fails to meet the basic requirements under 35 USC 103(a) of providing all of the claim limitations through the combination of references relied upon.

For at least these reasons, the Applicant requests that the final rejection be withdrawn, and the application allowed to issue as a patent.

Respectfully submitted,

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Reg. 41,199

Attorney for Applicant